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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Communication No. 540/2013

Decision adopted by the Committee at its fifty-fourth session (20 April-15 May 2015)

Submitted by:	C.S. (represented by counsel, Caroline Meraldi, Centre de contact-Suisse.sse.s-Immigré.e.s/SOS Racisme)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	15 March 2013 (initial submission)
Date of present Decision:	8 May 2015
Subject matter:	Deportation of the complainant to Turkey
Procedural issues:	None
Substantive issue:	Risk of torture upon return to country of origin
Article of the Covention:	3

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Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-fourth session)

concerning

Communication No. 540/2013*

Submitted by:	C.S. (represented by counsel, Caroline Meraldi, Centre de contact-Suisse.sse.s-Immigré.e.s/SOS Racisme)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	15 March 2013 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 8 May 2015,

Having concluded its consideration of communication No. 540/2013, submitted on behalf of C.S. under article 22 of the Convention,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention

1.1 The complainant is C.S., a Turkish national who was born on 1 January 1982. He claims that his deportation to Turkey would constitute a violation by Switzerland of article 3 of the Convention. He is represented by counsel, Ms. Caroline Meraldi (Centre de contact-Suisse.sse.s-Immigré.e.s/SOS Racisme).

1.2 Under rule 114 of its rules of procedure,[1] the Committee requested the State party, on 21 March 2013, to refrain from expelling the complainant to Turkey while his communication was under consideration by the Committee. On 22 March 2013, the State party informed the Committee that it would accede to that request.

The facts as presented by the complainant

2.1 The complainant, a Turkish national of Kurdish ethnicity, was born on 1 January 1982 in the province of Mardin, Turkey. In 1993, when he was 11 years old, he joined the armed struggle being waged by the Kurdistan Workers' Party (PKK) and left

* The following members of the Committee took part in the consideration of the communication: Ms. Essadia Belmir, Mr. Alessio Bruni, Mr. Satyabhoosun Gupt Domah, Mr. Abdoulaye Gaye, Mr. Jens Modvig, Ms. Sapana Pradhan-Malla, Mr. George Tugushi and Mr. Kening Zhang.

[1] This corresponds to former rule 108 of the Committee's rules of procedure (CAT/C/3/Rev.4).

Turkey for a PKK camp located near Erbil in Iraq, where he received military training. Following his departure from Turkey, his father and an uncle, both PKK combatants, were killed in a clash with the Turkish armed forces in Mardin. Between 1993 and 1996, the complainant was involved in fighting.[2] Having been injured during an air raid by the Turkish army,[3] he was transferred to the United Nations-operated camp at Mahmur, in Iraq, where he continued to provide assistance and logistical support to the PKK.

2.2 In late 2004, the complainant was detained by the United States armed forces, who put pressure on him to join their ranks. Knowing that he could not return to Turkey, he eventually agreed. After a period of military training in Mosul, Iraq, he took part in fighting under the American armed forces, which used him as a human shield.

2.3 The complainant attached two medical reports, dated 13 October 2009 and 5 June 2012. The first report, issued by the University Hospital of Zurich, states that he had been seriously affected by war experiences in 2004 when fighting with the American army in Iraq. During that time, he was made to walk, totally unprotected, in front of American tanks and he witnessed suicide attacks on a daily basis, only narrowly escaping one such attack himself. He witnessed the death of 110 people in a single day and also lost his friends, who "melted" before his eyes in a bombing. The medical report concludes that the complainant exhibits symptoms of post-traumatic stress disorder. The second medical report, issued on 5 June 2012 by the psychosocial centre in Fribourg, reaches the same conclusion.

2.4 Finding himself in an unbearable situation, the complainant decided to leave Iraq and, to that end, contacted an uncle living in Istanbul, who enlisted and paid a smuggler with whom the complainant left Iraq overland on 1 September 2005. He travelled to Tehran, Amman and then Geneva under the name of Temel Karasu on a borrowed Turkish passport that he later returned to the smuggler.

2.5 The complainant arrived in Geneva on 21 September 2005. The next day, he applied for asylum at the registration centre in Basel, Switzerland.

2.6 Out of fear that he would have to admit to having killed human beings while fighting for the PKK, which is considered a "terrorist" movement by Turkey and the European Union, and because of his extremely fragile mental health, the complainant initially told the Swiss authorities that he had never received military training from the PKK and had merely performed various chores for the party at the camp in Iraq.

2.7 By decision of 2 March 2007, the Swiss Federal Office for Migration rejected the complainant's application for asylum on the basis, inter alia, that his version of the events was implausible. The Office found that the account of his activities within the PKK was not credible and challenged his claim that he had not received even basic weapons training. The Office observed that thousands of persons had returned to Turkey without being systematically persecuted by the authorities, and the fact that he had been a refugee in Iraq did not, in itself, entail a real risk of persecution were he to return to Turkey. On 5 April 2007, the complainant appealed the decision.

2.8 In its ruling of 13 January 2009, the Federal Administrative Tribunal rejected the appeal, noting in particular that the complainant had left Turkey at the age of 11 and

[2] The complainant attached photographs of himself in military uniform. Initially, he claimed he had never engaged in fighting or received military training. See paras. 2.6 and 2.8 of the present decision.

[3] The complainant attached a medical certificate dated 17 February 2009 and issued by a doctor in Fribourg, Switzerland, which states that X-rays revealed the "presence of foreign metallic objects in the posterior thorax and upper right arm. These foreign objects are entirely consistent with shrapnel."

had not been back since. The Tribunal therefore found it implausible that he would be sought by the authorities. Moreover, at his hearing, the complainant claimed that he had never received military training or engaged in fighting. Testimony cited by the complainant established that he had never been involved in fighting and that his refusal to do so was the reason behind his departure. His later claims to the contrary were not deemed to be credible. The Tribunal thus decided that there was no particular reason for the Turkish authorities to view him as dangerous or suspicious, even though he, like thousands of others, had spent time at the Mahmur camp in Iraq. The Tribunal also observed that the complainant had never engaged in any political activities that would support the hypothesis that he was a wanted man. As to the risk of reprisals owing to the fact that the complainant is a relative of PKK activists, the Tribunal noted that, in Turkey, there is no rule or practice whereby a family shares responsibility for a crime committed by one of its members. However, the authorities may put pressure on, or take reprisals against, family members of political opponents if the wanted person or political opponent concerned has significant involvement in an illegal political organization. In the present case, the Tribunal held that no such threat could be established inasmuch as all the relatives of the complainant who had been PKK members had been dead for between 10 and 15 years, with the exception of an uncle who had been sentenced to life imprisonment in 2002. No reason was seen why the Turkish authorities would use that to target the complainant. The Tribunal further noted that relatives of the complainant, namely his mother and several of his siblings, continued to live in Turkey without experiencing any problems and no members of his family had fled the country.

2.9 On 20 February 2009, the complainant requested the Federal Office for Migration to review its decision of 2 March 2007 (see para. 2.7). The Office, treating this as a second asylum request, summoned the complainant to a hearing on 29 April 2009 and subsequently rejected the request by decision of 5 June 2009. On 9 July 2009, the complainant appealed that decision.

2.10 In its ruling of 18 February 2013, the Federal Administrative Tribunal rejected the appeal. It began by considering whether the alleged facts warranted reviewing its decision of 13 January 2009, before addressing whether the complainant's health, which was cited in support of his request, could justify a review of the 2 March 2007 decision of the Federal Office for Migration. The Tribunal reaffirmed the conclusions of previous decisions regarding the implausibility of the claims and, while recognizing that the complainant suffered from post-traumatic stress disorder, found that the condition could not be linked to his experiences as a PKK member and was more likely triggered by events that had taken place in Iraq while he was working for the American armed forces. The events, which had occurred in a third country, would thus not have the feared impact if he were to return to Turkey. The Tribunal further observed that the complainant could receive medical care in Turkey to preserve his physical and mental integrity. The appeal was therefore rejected.

2.11 The Federal Office for Migration then set a deadline of 19 March 2013 for the departure of the complainant, who claims to have exhausted the domestic remedies available to him.

The complaint

3.1 The complainant claims that his deportation to Turkey would constitute a violation by the State party of article 3 of the Convention. He contends that, as a result of his undeniable involvement with the PKK,[4] there are substantial grounds for believing that he would be subjected to torture if returned to Turkey.

[4] The complainant has attached photographs of himself in combat uniform, along with five

3.2 The complainant claims to have taken part in the armed struggle of the PKK when he was still young (between the ages of 11 and 14). He witnessed traumatic events, particularly acts of war, which had a serious impact on his mental health.[5] In addition, X-rays have revealed the presence of foreign metallic objects deemed to be consistent with shrapnel in the complainant's arm and chest.[6]

3.3 The complainant comes from a family known for its support of the PKK. His father, two of his uncles and four of his cousins were killed in combat, increasing the risk of his being targeted by the Turkish authorities. As the complainant himself is known to, and has attracted the attention of, the authorities,[7] he is personally at risk of being subjected to acts of torture in the event of his return.

State party's observations on the merits

4.1 On 12 September 2013, the State party submitted its observations on the merits. It noted that the complainant had merely reiterated to the Committee the reasons he had invoked before the national authorities, without providing any new evidence that might justify a review of the decisions taken by the Federal Office for Migration. The State party referred to the finding of the Federal Administrative Tribunal, which concluded that, as the complainant had left Turkey at the age of 11, had never been engaged in armed fighting and had not been back since, it did not seem plausible that the authorities would be looking for him or harbour suspicions about him. Moreover, all his relatives who had been active within the PKK had died, with the exception of an uncle who was in prison.

4.2 The State party reiterated that, according to article 3 of the Convention, States parties are prohibited from expelling, returning or extraditing a person to another State where there exist substantial grounds to believe that he or she would be subjected to torture. Recalling the criteria established by the Committee in its general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, which require the complainant to prove that he or she runs a personal, present and substantial danger of torture if deported to his or her country of origin, the State party submits that the Committee has already had occasion to examine communications in which complainants of Kurdish origin claimed that they would be at risk of being subjected to torture should they be returned to Turkey. On those occasions, the Committee noted that the human rights situation in Turkey was of concern, particularly with regard to PKK militants. It concluded, however, that a given complainant would face a real and personal risk of torture upon return to Turkey only where additional individual elements could be established, in particular the extent of their political activities within the PKK, the existence of any criminal charges against them and whether they had been subjected to torture in the past.[8]

4.3 The State party contends that the complainant has not submitted any individual elements showing that he faces a foreseeable, real and personal risk of torture if returned to Turkey. He mentions traumatic events that reportedly had a profound impact on his mental health. He also cites the presence of foreign objects consistent

testimonies by persons presenting themselves as former PKK combatants who met the complainant at the Mahmur camp.

[5] The complainant attached several medical certificates attesting to symptoms of post-traumatic stress disorder and bouts of depression.

[6] See footnote 3 above.

[7] The complainant attached a testimony dated 20 August 2010 and signed by the mayor of the village of Yardere, who maintains that he is often questioned about the complainant, his whereabouts and his activities, and says that he was recently summoned in that connection by the gendarmerie command in the village of Konakli.

[8] See, inter alia, communications No. 431/2010, *Y. v. Switzerland*, decision adopted on 21 May 2013, and No. 373/2009, *Aytulun and Güclü v. Sweden*, decision adopted on 19 November 2010.

with shrapnel in his arm and chest. According to the State party, the complainant has never claimed that these psychological and physical problems are the result of acts of torture committed in Turkey. The medical reports that he has submitted state that these problems stem from events experienced during the war. The reports do not mention signs, such as injuries, that would be relevant under article 3 of the Convention. According to the medical report of 13 October 2009,[9] the complainant's nightmares and other psychological problems started in 2004, when the Americans entered Iraq, and later worsened when he was in Switzerland. Those events, which occurred in a third country, are not relevant to assessing the risk of torture if he is returned to Turkey. There is no indication that the complainant has been tortured in Turkey in the past.

4.4 With regard to the complainant's political activities, the State party refers to his claim that he joined the armed struggle of the PKK at age 11 and was involved in fighting between 1993 and 1996, before being transferred to the Mahmur camp in Iraq, where he continued to provide material and logistical support to the PKK. At the end of 2004, he was allegedly detained by the American army and, after a period of military training in Mosul, took part in fighting with the American army. The complainant does not claim to have provided support to the PKK since his arrival in Switzerland in 2005.

4.5 The complainant's political activity within the PKK in Turkey dates to the distant past. He allegedly engaged in fighting more than 15 years ago, when he was still a child (between the ages of 11 and 14). Moreover, he had only minor involvement and that was only between 1993 and 1996. The complainant has failed to demonstrate the relevance of these facts to his current situation and their relation to the Turkish authorities' current interest in him for activities that happened so long ago and were so minimal. This is corroborated by the fact that no judicial proceedings are under way against the complainant and there is no indication that he might be arrested or tortured in the event of his return.

4.6 As to his activities within the PKK, the complainant initially stated that he had never received military training or engaged in fighting, but had only performed various chores at the camp.[10] He subsequently retracted those claims and stated that he had received military training from the PKK, had taken part in the armed struggle and had been involved in fighting between 1993 and 1996. This retraction was not deemed by the Federal Administrative Tribunal to be credible, particularly in the light of testimony that corroborated the complainant's original statements, indicating that he was "reserved" and had not taken part in fighting. The factual inconsistencies between the complainant's allegations and the testimony given are such that it is implausible that the complainant's involvement with the PKK could expose him to persecution by the Turkish authorities.

4.7 According to the State party, the photographs submitted by the complainant are irrelevant. In the ones that allegedly show him as a PKK combatant, it cannot be determined what activity is being engaged in by the persons pictured, while in the photographs of soldiers serving with the American army in Iraq, which are related to neither the PKK nor Turkey, it cannot be ascertained who is pictured or when and where the photographs were taken.

4.8 The State party reiterates that no judicial proceedings are under way against the complainant and that the statement from the mayor of Yardere to the effect that the

[9] See para. 2.3 of the present decision.

[10] Deposition of 27 September 2005, attached to the case file. See para. 2.8 of the present decision.

complainant is a wanted man[11] is written in general terms and offers no explanation as to why he would be of such interest to the authorities.

4.9 With regard to the complainant's family ties to PKK members, the State party refers to the conclusions reached by the Federal Administrative Tribunal and contends that the complainant has failed to demonstrate that he is at risk of reprisals (see para. 2.8). The complainant has not provided proof of close family ties to anyone who is currently being sought by the authorities. Moreover, he has not demonstrated that his family, who still live in Turkey, have been harassed by the authorities. According to his statements, one of his brothers was living in Nusaybin in the province of Mardin and another was performing his military service at the time the complainant arrived in Switzerland.

4.10 In the light of the foregoing, the State party submits that there are no substantial grounds for believing that the complainant would face a real and personal risk of torture upon return to Turkey. Therefore, his deportation would not constitute a violation of article 3 of the Convention.

Complainant's comments on the State party's observations

5.1 The complainant submitted comments on 22 April 2014. He reiterated that he had received military training and fought in the ranks of the PKK; he maintains that the contradictions in his account are attributable to his fragile mental state. He had discussed the nature of his military activities before the appeal authority (the Federal Administrative Tribunal) in August 2013, but the Tribunal limited itself to considering only the information presented at his first hearing.

5.2 The complainant claims that the Turkish authorities have PKK combat photographs in which he appears and which were previously in the possession of combatants who were subsequently arrested. He argues that his personal situation is different to that of his family members who have remained in Turkey and have not been bothered by the authorities, in that he left the country at age 11. He maintains that, if returned, he would be interrogated by the Turkish authorities about his absence from the country between 1993 and 2005, the year in which he arrived in Switzerland. Moreover, his mother and one of his brothers currently live in Kyiv. The complainant appends an affidavit from his brother dated 16 March 2014, describing how, in the years following the complainant's departure, strangers introducing themselves as "patriots" would question the family about the complainant. In 1997, the Turkish special forces surrounded and searched the family home in Nusaybin, before arresting the complainant's mother and detaining her at an undisclosed location. The family later learned that she had been taken to the counter-terrorism office, where she was tortured for three days. After her release, the family reportedly continued to be harassed to the point that they left Nusaybin for Mersin and, a year later, moved to Istanbul, where they were again interrogated. In 2003, the family returned to Nusaybin, where they were subjected to the same harassment and questioning about the complainant as in the past. In 2011, shots were fired at the family vehicle. It was then that the complainant's brother decided to leave Turkey for Kyiv, which is where he currently lives with his mother. The complainant reiterates that the threat to him stems, inter alia, from the fact that he left Turkey, unlike his family.

5.3 The complainant adds that, in Turkey, confirmed or suspected PKK members continue to be at risk of ill-treatment and torture. He maintains that his personal situation and status as a former combatant must be viewed in the context of the prevailing political climate in Turkey, and reiterates that he is wanted by the Turkish authorities because of his family's reputation and the extended time he has spent

[11] See footnote 7 above.

outside Turkey. He rejects the State party's argument that it is the level of his involvement with the PKK that should be the determining factor, asserting instead that a presumed affiliation with the PKK is sufficient to place someone at risk of ill-treatment. The complainant states that his family background has not been given adequate consideration by the Swiss authorities. He repeats that: his father and an uncle were killed in a clash with the Turkish authorities; another of his uncles suffered the same fate; one of his uncles has been sentenced to life imprisonment; and four of his cousins were killed or are missing. Consequently, and by the mere fact that he belongs to a family of PKK combatants known to the Turkish authorities, the complainant claims that he is already a suspect in the eyes of the Turkish authorities and that his life is therefore at risk.

Additional submission by the State party

6.1 On 26 June 2014, the State party contended that none of the above-mentioned comments from the complainant contained new, relevant evidence regarding his return to Turkey. As to the political climate in Turkey, the State party notes that Turkey and the PKK leader, Abdullah Öcalan, started peace negotiations in late 2012 to end the Kurdish conflict, which has not claimed any lives since February 2013. On 21 March 2013, Mr. Öcalan called for a ceasefire, which was largely respected by both sides in 2013 except for some residual PKK attacks near the end of the year. According to the Diyarbakir branch of the Human Rights Association of Turkey, the number of reported cases of torture and ill-treatment fell significantly in 2013. This is an important consideration for establishing the complainant's risk of being subjected to torture in the event of his return.

6.2 With regard to the complainant's health, the State party has noted the medical reports submitted and reaffirms its observations on the merits.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any complaint contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the matter has not been and is not being examined under another procedure of international investigation or settlement.

7.2 The Committee notes that the State party has not challenged the admissibility of the complaint. The Committee considers that the complainant's allegation under article 3 has been sufficiently substantiated, declares the complaint admissible and proceeds to its consideration of the merits.

Consideration of the merits

8.1 The issue before the Committee is whether returning the complainant to Turkey would constitute a violation of the State party's obligation, under article 3 of the Convention, not to expel or return (*refouler*) a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

8.2 In establishing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to Turkey, the Committee must take into account all relevant criteria, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in Turkey. The issue that needs to be determined, however, is whether the complainant runs a personal risk of being subjected to torture in the country to which he would be returned.

8.3 The Committee refers to its general comment No. 1, to the effect that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to be shown to be highly probable, the Committee recalls that the burden of proof normally falls on the complainant, who must present an arguable case establishing that he runs a foreseeable, real and personal risk. The Committee also recalls that, as indicated in its general comment No. 1, while it gives considerable weight to the findings of the State party's bodies, the Committee may freely assess the facts of each case in the light of the particular circumstances.

8.4 In this case, the Committee considers that the facts as presented do not permit it to conclude that the complainant would at present run a real, foreseeable and personal risk of torture in the event of his return to Turkey. The Committee observes that, on 2 March 2007, the Federal Office for Migration noted inconsistencies and contradictions in the complainant's account during his asylum proceedings. On 13 January 2009, the Federal Administrative Tribunal rejected the complainant's appeal on the grounds that it was implausible that he was being sought by the Turkish authorities, particularly given that: he had left Turkey when he was 11 years old and had not returned since; he had initially claimed never to have received military training or engaged in fighting; he had never engaged in any political activities; and all his relatives who had been active within the PKK had been dead for between 10 and 15 years, with the exception of an uncle who was serving a life sentence in prison.

8.5 The Committee observes that, on 18 February 2013, the Tribunal, upon considering a new appeal filed in connection with a second asylum request, reaffirmed the conclusions of previous decisions regarding the implausibility of the complainant's claims and examined whether his health situation warranted reviewing the original decision issued by the Federal Office for Migration. The Tribunal acknowledged that the complainant suffers from post-traumatic stress disorder, but held that his condition was the result of events that had occurred in Iraq, when he was working for the American army; it could not be imputed to Turkey or cited to suggest any danger in the event of a return to Turkey. The Tribunal also observed that the complainant could receive appropriate medical care, including psychological support, in Turkey.

8.6 The complainant has not produced any evidence before the Committee to dispute those conclusions, such as the existence of any criminal proceedings against him, nor has he claimed to have been subjected to torture or ill-treatment in Turkey. Even if he had fought in the ranks of the PKK between 1993 and 1996, as he argues before the Committee, those events date back almost 20 years to when the complainant was just 11 to 14 years old. The Committee is of the opinion that those activities' limited scope and remoteness in time, coupled with the facts that no criminal proceedings have been brought against the complainant in Turkey and that he has not engaged in any political activities since leaving Turkey, including in Switzerland, indicate that those activities are not sufficiently relevant for establishing a personal risk.

8.7 The complainant has also referred to war injuries in his arm and chest, which have been medically established to be consistent with shrapnel wounds. The complainant has not, however, claimed that these injuries are the result of torture or ill-treatment by the Turkish authorities; rather, they were sustained during a wartime bombing by the Turkish army.

8.8 As to the complainant's health, the Committee recognizes that he suffers from post-traumatic stress disorder, as medically certified and acknowledged by the State party authorities. Nevertheless, the Committee notes that, according to the medical reports submitted, the condition was triggered by traumatic events that the complainant experienced in Iraq in 2004 and 2005, when he took part in military operations with the American army. Accordingly, his health situation cannot be considered as an element in assessing the risk he faces in the event of a return to

Turkey. Moreover, the Committee recalls that the State party has established that appropriate physical and psychological medical care is available in Turkey. The Committee has no reason to question those conclusions. The Committee has previously found that the fact that a complainant suffers from psychological problems cannot, in itself, be seen as sufficient grounds creating an obligation for the State party to refrain from expelling him or her.[12]

8.9 Taking into account all the information made available to it, the Committee considers that the complainant has failed to provide sufficient evidence to demonstrate that he would face a foreseeable, real and personal risk of being subjected to torture if returned to his country of origin.

9. The Committee, acting under article 22, paragraph 7, of the Convention, therefore concludes that the return of the complainant to Turkey would not constitute a breach of article 3 of the Convention.

[12] *Communication No. 356/2008, N.S. v. Switzerland, decision adopted on 6 May 2010, para. 7.5.*